

Guideline Sentencing Update



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General Application Principles

RELEVANT CONDUCT—DOUBLE JEOPARDY

Fifth Circuit holds defendant may be tried for offense that was used as relevant conduct in prior sentencing.

Defendant was part of a conspiracy that attempted to import 591 kilograms of cocaine in Aug. 1990. He was not arrested then, but was arrested later for the conspiracy's Feb. 1991 possession of 375 pounds of marijuana with intent to distribute. When defendant was sentenced for the marijuana offense the cocaine was included as relevant conduct, increasing his guideline range from 63–78 months to 292–365 months, but he was sentenced to 144 months after a §5K1.1 departure. Defendant was then indicted for the cocaine offense, but the district court dismissed the indictment, holding that punishment for that offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment. *See also U.S. v. Koonce*, 945 F.2d 1145, 1149–54 (10th Cir. 1991) (double jeopardy violated by punishing same conduct that was previously included as relevant conduct); *U.S. v. McCormick*, 992 F.2d 437, 439–41 (2d Cir. 1993) (following *Koonce*, affirmed dismissal of charges).

The appellate court remanded, finding that Congress had authorized multiple punishments through the Guidelines. Section 5G1.3(b) (added after the *Koonce* decision), requires concurrent sentences when a prior offense has “been fully taken into account in the determination of the offense level for the instant offense,” and thus “clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense—and sentence him again for all relevant conduct. . . . [W]e are satisfied that §5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings—and that Congress accomplishes this intent—not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction in a single proceeding. Section 5G1.3(b), therefore, accomplishes in successive proceedings what grouping of counts pursuant to §3D1.2 accomplishes in a single proceeding.” The court held there is “no basis for distinguishing the situation described by §5G1.3(b)” —in which an earlier offense is fully taken into account in sentencing for the instant offense—from the reverse situation presented here.

The court also rejected defendant's claim that, because the §5K1.1 motion from the first case will not apply to the second, it is unfair to allow the government to seek what will actually be a longer (although concurrent) sentence than if both offenses had been tried together and sentenced under §3D1.2(d). *See* §1B1.1(d) & (i) (indicating §5K departures are considered after offenses have been grouped). If defendant

is convicted, the court noted, “the base offense level will necessarily be the same as that for the marijuana offense because relevant conduct is the same for both the marijuana and cocaine offenses,” and he may be subject to a concurrent sentence of 292–365 months, depending on adjustments.

U.S. v. Wittie, 25 F.3d 250 (5th Cir. 1994). *See also U.S. v. Cruce*, 21 F.3d 70, 73–77 (5th Cir. 1994) (affirmed: not a double jeopardy violation to indict defendants in Texas on bank fraud conspiracy charges that include loan transaction that was used as relevant conduct when defendants were sentenced in Kansas on other bank fraud charges; Kansas and Texas conspiracies are separate offenses, and “we hold that Congress has not (in the Sentencing Guidelines) evinced the clear intent necessary to preclude punishment for a separate and distinct offense, even though the underlying conduct has been used previously to enhance another sentence. . . . [I]t chose only to *limit* punishments in the second proceeding [through §5G1.3(b)]—not to preclude that proceeding and the consequent punishment altogether”).

Outline at I.A.4.

Offense Conduct

Loss

U.S. v. Goodchild, 25 F.3d 55 (1st Cir. 1994) (Affirmed: Inclusion of late fees and finance charges in credit card fraud loss is not prohibited by §2F1.1, comment. (n.7). “We hold that in a case involving the fraudulent use of unauthorized credit cards, finance charges and late fees do not come within the meaning of the Commentary phrase ‘interest the victim could have earned on such funds had the offense not occurred.’ This phrase, we think, refers to opportunity cost interest. In a credit card case there is an agreement between the company and the cardholder to the effect that when payments are made late, or not at all, the cardholder is subject to late fees and finance charges. This is part of the price of using credit cards. The credit card company has a right to expect that such fees and charges will be paid. This is not ‘interest that the victim could have earned on such funds had the offense not occurred.’”). *See also U.S. v. Henderson*, 19 F.3d 917, 928–29 (5th Cir. 1994) (Interest on fraudulently obtained loans was properly included: “Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction.” Note 7 “sweeps too broadly and, if applied in this case would be inconsistent with the purpose of §2F1.1.”). *Outline* at II.D.

ESTIMATING DRUG QUANTITY

U.S. v. Hendrickson, No. 92-1386 (2d Cir. June 13, 1994) (Sotomayor, Dist. J.) (Remanded: Where defendant produced only 77 grams of heroin over a two-year period, his initial expression of intent to import 50–60 kilograms of heroin was not sufficient to show he intended and was able to produce that amount. Under former §2D1.4, comment. (n.1), “where the

Government asserts that a defendant negotiated to produce a contested amount, we hold that the Government bears the burden of proving the defendant's intent to produce such an amount, a task necessarily informed, although not determined, by the defendant's ability to produce the amount alleged to have been agreed upon. . . . [W]e do not, at least in a conspiracy case, require sentencing courts to exclude from consideration only those drug amounts which the defendant neither intended to produce nor was reasonably capable of producing. Instead, we shift the sentencing guideline § 2D1.4 analysis back to its proper focus—the 'object of the conspiracy.' In other words, courts must consider the amount of drugs the conspirators agreed to produce. . . . [D]efendant's ability, which includes that of his coconspirators, to produce specific amounts of narcotics, is highly relevant in determining whether the conspirators agreed to produce these amounts." The court added that this analysis would apply to § 2D1.1, comment. (n.12). (Winter, J., dissented.).

Outline at II.B.4.a.

U.S. v. Pion, 25 F.3d 18 (1st Cir. 1994) (Affirmed: Despite district court's finding that defendant was not "reasonably capable of producing" additional three kilograms he negotiated, that amount was properly included as relevant conduct under § 2D1.1, comment. (n.12), because "he was a member of a conspiracy whose object was to distribute more than six kilograms and . . . he specifically intended to further the conspiratorial objective. . . . [N]either conjunctive clause in note 12 can be ignored." Also, defendant's "inability to produce the additional three kilograms was no impediment to its imposition of the ten-year minimum sentence mandated by statute. . . . Absent a statutory alternative, . . . we think application note 12 provides the threshold drug-quantity calculus upon which depends the statutory minimum sentence fixed under 21 U.S.C. § 841(b)(1)(A)(ii)."). *But cf. U.S. v. Legarda*, 17 F.3d 496, 500 (1st Cir. 1994) ("Our case law has followed the language of this Commentary Note in a rather faithful fashion, requiring a showing of both intent and ability to deliver in order to allow the inclusion of negotiated amounts to be delivered at a future time.").

Outline at II.B.4.a.

Determining the Sentence

RESTITUTION

U.S. v. Gibbens, 25 F.3d 28 (1st Cir. 1994) (Remanded: It was error to order restitution to cover loss to government involved in defendant's illegal purchase of food stamps from undercover agent at one quarter their face value. Although the government can be a "victim" under the Victim and Witness Protection Act, its application in this situation is unclear and "nothing in the legislative history of either the organic Act or its amendments indicates that losses incurred in government sting operations should be subject to recoupment under the VWPA." Thus the appellate court invoked the rule of lenity to hold that "a government agency that has lost money as a consequence of a crime that it actively provoked in the course of carrying out an investigation may not recoup that money through a restitution order imposed under the VWPA. . . . [However,] other methods of recovery remain open to the government, notably fines or voluntary agreements for restitution incident to plea bargains.").

See *Outline at V.D.2* and summary of *Meacham* in 6 *GSU* #15.

Adjustments

OBSTRUCTION—RECKLESS ENDANGERMENT

U.S. v. Young, No. 93-50186 (9th Cir. June 7, 1994) (Hug, J.) (Remanded: Reckless endangerment enhancements for defendants who did not drive during high-speed chase were improper without specific findings that, pursuant to § 3C1.2, comment. (n.5), defendants "aided or abetted, counseled, commanded, induced, procured, or willfully caused" the driver's reckless conduct. "[T]he government must establish that the defendants did more than just willfully participate in the getaway chase. It must prove that each defendant was responsible for or brought about the driver's conduct in some way. Such conduct may be inferred from the circumstances of the getaway, . . . and the enhancement may be based on conduct occurring before, during, or after the high-speed chase. . . . Thus, enhancement under section 3C1.2 requires the district court to engage in a fact-specific inquiry.").

Outline at III.C.3.

ROLE IN THE OFFENSE

U.S. v. Smaw, 22 F.3d 330 (D.C. Cir. 1994) (Remanded: A "GS-7 time and attendance clerk" did not occupy a position of trust within the meaning of § 3B1.3's amended commentary. Although defendant clearly abused her position, it was not "a position of public or private trust characterized by professional or managerial discretion" and she was not "subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature," as is now required under Application Note 1. Although defendant was sentenced before Nov. 1, 1993, the amended Note should be applied because it is clarifying, rather than substantive.).

Outline at III.B.8.a.

Criminal History

CONSOLIDATED OR RELATED CASES

U.S. v. Hallman, 23 F.3d 821 (3d Cir. 1994) (Remanded: Defendant's prior sentence for forgery should not have been counted in the criminal history score for the instant conviction for possession of stolen mail because the two offenses were related as "part of a single common scheme or plan," § 4A1.2(a)(2), comment. (n.3). "[A]ll of the stolen mail . . . was in the form of checks or credit cards and [the check in the prior forgery offense] was from a sequence of blank checks found within the stolen mail. Therefore, it is reasonable to infer that the mail was stolen to find checks or other instruments that could be converted to use through forgery." Noting that "intent of the defendant is a crucial part of the analysis," the court distinguished *U.S. v. Ali*, 951 F.2d 827, 828 (7th Cir. 1992), because there the defendant had no prior intent to forge a money order he obtained in the robbery of a supermarket.).

Outline at IV.A.1.b.

Sentencing Procedure

UNLAWFULLY SEIZED EVIDENCE

U.S. v. Kim, 25 F.3d 1426 (9th Cir. 1994) (Affirmed: Drugs seized during an illegal search may be included as relevant conduct where the search was not carried out for the purpose of increasing defendant's offense level. The appellate court left open the question whether suppression "would be necessary and proper" if evidence was illegally obtained for the purpose of increasing a defendant's guideline sentence.).

Outline at IX.D.4.